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The 1984 Amendments to the Longshore and Harbor Workers' Compensation Act*

The Longshore and Harbor Workers' Compensation Act provides workers' compensation for disabilities suffered by maritime workers in inland navigable waters of the United States. On September 28, 1984, President Reagan signed into law the 1984 amendments to the act (Public Law 98-426). The current amendments are intended to reduce costs to employers incurred following the 1972 amendments, and to provide more protection to workers who develop work-related diseases after a protracted period.

Legislative changes were made to limit the jurisdiction of the act, restrict third-party liability, and improve claims practices by employers, doctors, and claimant representatives. Public Law 98-426 was enacted to strengthen the subsequent injury fund; place limits on death benefits, cost-of-living increases, and other benefit provisions; and to liberalize provisions for occupational disease claims, including establishing the right of claimants to such benefits even after the claimant has retired and has no wages to be replaced.

Background

The Longshoremen's and Harbor Workers' Act was enacted in 1927 to protect maritime workers who fell between the jurisdiction of State workers' compensation laws and the protection offered seamen under the Jones Act.[1]

Previously, the Supreme Court ruled that State workers' compensation laws could not be applied to injury cases occurring over inland navigable waters because such application of dissimilar laws conflicted with general maritime law. To insure coverage for such cases, the Longshore Act became the national law governing inland navigable waters. Coverage was extended to workers loading and unloading cargo, ship repairmen and ship builders, and other longshore occupations. Benefits are provided through private insurance or self-insurance under conditions set by the Department of Labor.

By legislative extension, this program also applies to employees of Federal contractors on overseas military, air, or naval bases; individuals on public works contracts performed outside the continental United States; workers employed in nonappropriated fund instrumentalities, such as post exchanges; and employees engaged in operations on the Outer Continental Shelf. Over 500,000 workers are included under the Longshore Act and its extensions.

Before the 1984 law, the Longshore and Harbor Workers' Act had most recently been amended in 1972 (Public Law 92-576). Until then, statutory benefits under the longshore worker program had fallen greatly behind rising wage levels. By 1972, the $70 maximum weekly benefit for temporary total disability under the program replaced only 51 percent of a worker's wage at the average wage in private nonagricultural industry—rather than the two-thirds intended by law. The 1972 amendments raised the maximum weekly benefit amount over several years and instituted an automatic escalator. The automatic feature kept the maximum weekly benefit at 200 percent of the national average wage so that most disabled workers would receive a benefit of two-thirds of their weekly earnings. Also, the benefit and eligibility provisions were liberalized for survivor and other benefits.

The 1972 amendments extended the jurisdiction of the longshore program to cover certain shoreside workers who were previously subject to constantly changing jurisdiction as they went

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[1] The Jones Act enables merchant seamen who are injured to sue their employers for negligence. Such suits severely limit the three major defenses previously available to employers: the fellow servant rule, contributory negligence, and assumption of risk.

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between ship and shore. At the same time, the amendments placed limits on third-party suits[2] to reduce multiple liability by employers. In particular, the amendments were intended to prevent employers such as stevedores from being subject to both a workers' compensation claim and a lawsuit predicated on rules of strict liability under the doctrine of unseaworthiness.

However, by the end of the 1970's, costs of the program had risen greatly; backlogs had developed in claims administration; problems of abuse by employers, claimants, and doctors were uncovered; and litigation concerning coverage had expanded the act's jurisdiction through broad interpretation of the 1972 amendments. The annual number of cases disposed of under the program rose from 71,000 in 1971 to 161,000 in 1983, and the corresponding number still active in those years increased from 18,000 to 47,000.

Coverage and Liability

The 1984 amendments exempt several groups from coverage: (1) persons performing clerical, data processing, and other office work exclusively; (2) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet; (3) those employed by a marina but not engaged in construction work on the marina except for routine maintenance; (4) employees of suppliers, transporters, or vendors who are temporarily on the premises of a covered employer but not doing the usual work of that employer; (5) aquaculture workers; and (6) individuals employed to build, repair, or dismantle recreational vessels under 65 feet long. The exclusion of these categories is intended to make clear that coverage depends on the substance and purpose of the work being done—that is, coverage applies only to those whose work is closely involved with the movement and processing of ocean cargo. On the other hand, workers are exempt from the Longshore Act only if they are within the jurisdiction of State workers' compensation laws.

The amendments also enact a rule of exclusive liability so that shipbuilders and other employers who are liable to pay compensation under the Longshore Act are not also liable under another workers' compensation program or the Jones Act. Under the 1984 law, multiple liability is controlled, therefore reducing costs to employers. The law provides rules governing contractor and subcontractor liability and immunity under the Longshore Act. One rule, for example, makes the obligation of a contractor to secure compensation for the employees of a subcontractor contingent on the failure of the subcontractor to secure compensation for its own employees. But, if the contractor does have to assume this obligation, then the contractor is immune to third-party suits by employees of the subcontractor.

When an injured worker receives workers' compensation payments, he may institute a suit against a third party for negligence. After 6 months, his employer is assigned the right to seek reimbursement through a third-party action. The 1984 amendments limit this assignment to 90 days, as defined by the amendments. Thereafter, the right to sue the third party reverts to the employee.

The 1984 amendments establish procedures for distributing the proceeds of a successful third-party suit by the worker. First, lawyers' fees and other litigation expenses are to be provided. Then, the employer is entitled to reimbursement from the net proceeds for workers' compensation benefits being paid. Also, the law repeals the employer's right to 20 percent of any excess recovery when the employer brings a third-party action on the employee's behalf.

Benefit Limits

A number of restrictions on medical service providers were established to reduce abuse. For example, the Department of Labor may debar medical providers from practice in longshore cases and may order a change in physician where charges have exceeded customary levels. The amendments clarify certain aspects of hearing-loss cases, establishing criteria for giving audiograms presumptive weight to determine the extent of loss. They require that the determination of hearing loss must be made in accordance with the American Medical Association's Guide to the Evaluation of Permanent Impairment.

The new law places several restrictions on cash benefits for disabled workers and for survivors of disabled workers. First, a cap previously imposed on the statutory maximum weekly benefit amount for disabled workers will now also be applied for survivors: 200 percent of the national average weekly wage. Thus, the amendment establishes parallel treatment for the two types of benefits. Further, the benefit amount awarded a survivor may not exceed the worker's weekly wage.

Second, benefits will now be payable to survivors of beneficiaries with permanent total disabilities only when the death is due to the injury for which the benefit was received. Previously, survivor benefits were payable regardless of the cause of death. Third, automatic increases in benefits for

[2] Third-party suits are those that the injured worker may file against a party other than the employer (because of an unsafe work place, defective equipment, or other conditions that may have caused the injury). In some instances, the third party could then recover its losses by bringing suit against the employer

disability or death will continue to be calculated as equal to the increase in the national average wage, but are now subject to a 5-percent annual ceiling.

The 1984 amendments also confirm a Supreme Court decision that, in the calculation of benefit amounts, a worker's wage is to be defined as cash wages at the time of injury, including equivalent amounts for meals, lodging, and other perquisites withheld for tax, but excluding employee benefits such as employer contributions to retirement, health and welfare, insurance, social security, or any other plan for the employee or his dependents.[3] This provision helps reduce employer costs and prevents workers' benefits from being excessive in relation to their wage.

Benefit Extensions

The major enhancement of workers' benefit rights enacted in the 1984 longshore amendments was the provision broadening benefit eligibility for disability resulting from occupational disease. The new law specifically provides that a claim can be filed after a work-related disease becomes manifest rather than within a specified time after the last exposure to injurious elements on the job. An employee or survivor can now provide notice of the disease to the employer up to 1 year after the time the employee or survivor becomes aware (or reasonably could have been expected to become aware) that the worker's disease was related to exposure at the work place. A claim for compensation may be filed within 2 years of knowing the relationship of the disease to the employee's work.

Previously, notice was required within 30 days for occupational disease cases (as it still is for accidental injury cases) and claims had to be filed within 1 year (as they still must, for injury cases).

Further, benefits are payable even if the disease does not become manifest until after the worker retires. In this situation, the benefit is provided for an impairment (rather than for wage replacement) and so is paid as a permanent partial disability benefit. If the disabling condition occurs during the first year of retirement, the benefit is computed on the basis of the worker's wage in the year before retirement or, if appropriate, the worker's most recent wage level before any decrease in wages attributable to the effects of the disease. If the condition occurs more than a year after retirement, the wage used for benefit computation is the national average weekly wage at the time of injury.

The new legislation includes increases in the maximum amounts payable for certain types of benefits. The allowable funeral expense payment rose from $1,000 to $3,000, and the maximum disfigurement benefit went up from $3,500 to $7,500.

The Special Fund

The longshore program includes a Special Fund that is used to pay benefits for disabilities that in part are made worse due to the existence of an earlier injury.[4] This fund thus encourages employers to hire previously disabled workers by removing any liability attributable to the earlier injury from the current employer. It is also used to pay for cost-of-living increases granted to some beneficiaries under the Longshore Act.

Under the 1984 amendments, steps were taken to curb rising costs experienced by the Special Fund due to its improper use by employers. Special Fund assessments on employers as a percentage of Longshore Act benefit payments had risen from 5.7 percent in 1973 to 11.5 percent in 1982. The amendments adopt a new assessment formula for financing the fund. To discourage excessive use of the fund the formula for determining the employer's payment takes into account the amount of fund cases attributable to each employer or insurer.

Employers must request relief under the Special Fund before the Department of Labor considers the claim. In addition, the amendments prohibit use of the fund by uninsured employers or carriers not authorized to write Longshore Act coverage. Previously, companies that avoided the insurance requirements of the act were nevertheless able to have costs of cases that they were initially responsible for transferred to the Special Fund.

Administrative Changes

A number of changes were made to improve the efficiency of operating the longshore program. An amendment that may prove to be particularly significant in expediting claims is the requirement that when parties agree on a settlement of a claim, the responsible Department of Labor official is to approve the settlement within 30 days unless it is found to be inadequate or has been procured by duress. If the official disapproves a settlement, a

[3] Previously, some awards had been granted with benefits computed on wages that included the value of employee benefits.

[4] Similar funds, generally called second injury or subsequent injury funds, are included in each State workers' compensation law.

written statement of the reasons for disapproval is to be issued within 30 days of receiving the application settlement. If the parties are represented by counsel, then agreements are automatically deemed to be approved unless the Department official specifically disapproves the request within 30 days of submission.

Another change was the expansion of the Benefits Review Board of the Department of Labor to expedite processing the backlog of cases. The permanent board membership has been increased from three to five, and appointment has been authorized of additional temporary administrative law judges and support staff.

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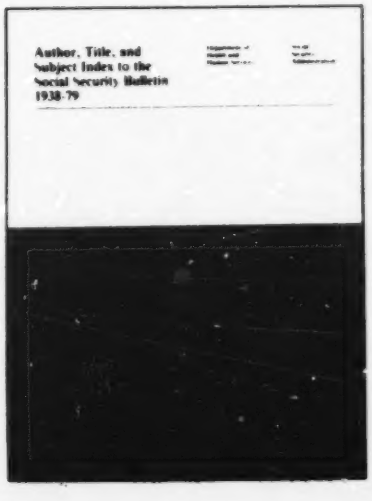

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